Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 25	)	
of the Cable Television Consumer	)	
Protection and Competition Act	)	
of 1992	)	MM Docket No. 93-25
	)	
Direct Broadcast Satellite	)	
Public Interest Obligations	)	

COMMENTS OF CONSUMER FEDERATION OF AMERICA

Of Counsel:

Bradley Stillman

Table of Contents

I. Introduction

The Consumer Federation of America (CFA)[1] hereby submits these reply comments in response to the above-referenced Notice of Proposed Rulemaking on Direct Broadcast Satellite Public Service Obligations ("Notice").

Some of the comments filed by the DBS industry in this proceeding indicate apparent dissatisfaction with the public interest provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). Some industry

commenters.

II. Amount of Capacity to be Made Available for Noncommercial Educational and Informational Programming.

A. Calculating the Appropriate Amount of Capacity on a Particular System.

A number of different scenarios are put forth by the industry in an attempt to dilute the 4-7% noncommercial capacity requirement mandated by the statute. Some suggest making the calculation based on a 24mhz standard and assuming 4:1 compression[2] or simply assuming 4:1 compression based on the number of transponders.[3] One industry commenter suggests making the calculation based only upon the amount of programming specifically tailored for DBS.[4]

At first blush, simply using a 4:1 ratio appears to offer a very simple approach. However, this approach has a fatal defect. It fails to account for the inevitable changes and improvements in compression techniques which could be in place before DBS service is even launched, or certainly shortly thereafter. An

---

[2] See; Comments of United States Satellite Broadcasting Company, Inc. (USSB) at 4.

[3] Comments of DirecTv, Inc. at 10.

[4] USSB at 3.

approach which seeks to freeze noncommercial capacity at percentages based on current technology is not only fundamentally unfair, but it runs a significant risk of running afoul of the law.

The 4 percent to 7 percent set-aside is to be based on channel capacity and is a non-negotiable prerequisite for providing DBS service.[5] As capacity increases, so must the amount of noncommercial capacity.[6] The number of channels was not simply tied to the amount of capacity at the time the license was granted or at the time of launch, but rather to the amount of capacity as it changes on an ongoing basis.[7]

---

[5] §335(b)(1) ("The Commission shall require, as a condition of any provision, initial authorization of , or authorization renewal for a provider of direct broadcast satellite service...reserv[ation] of a portion of its channel capacity, equal to no less than 4 percent nor more than 7 percent, exclusively for noncommercial programming...")(emphasis added).

[6] The Conference Report indicates Congress did not intend for the amount of noncommercial capacity to remain static as a DBS system's capacity grows. This report language also provides further evidence that Congress intended the Commission to subject larger systems to relatively higher percentages of noncommercial capacity set-asides than smaller capacity systems. H.R. Conf. Rep. No. 124, 102d Cong., 2d Sess. 1, 100 (1992) ("The Conferees intend that the Commission consider the total channel capacity of a DBS system in establishing reservation requirements. Accordingly, the Commission may determine to subject DBS systems with relatively larger total channel capacity to a greater reservation requirement then systems with relatively less total capacity.")

[7] Of course, the Commission could find that a review of the number of channels being received by subscribers should be done quarterly, or twice per year for purposes of determining how much capacity must be devoted to noncommercial programming.

If noncommercial capacity is set now with no provisions to increase with technological advancements as compression technology improves, the amount of capacity devoted to qualified noncommercial programming could dip below 4 percent.[8] This would be in direct conflict with the law.[9]

CFA maintains that an approach which measures channel capacity based on NTSC equivalent channels provides the Commission with an easily workable measure, which carries no danger of violating the law. This approach can easily account for situations where a combination of different compression ratios are employed by the DBS provider based on the type of programming offered. Furthermore, it is based on the number of channels actually received by subscribers in their homes, which is the most appropriate measure.

The proposal by USSB that the amount of noncommercial capacity be determined based only upon that programming

services should not count.[10]

This approach ignores several key facts. First, there is absolutely no indication in the Act or its legislative history that Congress intended to exempt the capacity occupied by what most parties agree will be the bulk of DBS' initial programming.[11] Second, the obligation to meet the public interest requirements is on the operator, not the programmers. Lastly, Congress recognized that the nature of DBS was significantly different from either cable or broadcasting in that it is a national service, so the public interest obligations must reflect this fact.

Cable operators negotiate with local authorities to establish their public interest requirements and broadcasters, like DBS operators, must meet public interest requirements in exchange for their license and the use of the public airwaves. The fact that the obligations are different for DBS operators that other services is completely intentional, and USSB's

---

[10] USSB at 3 states that "since no similar public interest programming obligation have been imposed on cable television providers, the programming on the channel is not likely to have been planned with programming responsive to the public interest programming requirement."

[11] USSB's approach would create an incentive for DBS operators to buy only programming produced for other video services. This would allow DBS operators to avoid Congress' mandate and would limit, rather than expand, diversity in programming. In short, it would make the public interest requirements a sham.

proposal must be summarily discarded as a matter of law.

B. Immediate Implementation vs. "Grandfathering" Existing Contracts.

The DBS industry would like to phase in any public interest requirements over time, either by phasing in the noncommercial capacity requirement over time or through grandfathering existing programming agreements.[12] CFA understands there may be a need for a slight delay (i.e. 30 days) before Primestar, the only operational system, could make room to meet its public interest requirements. However, there is no basis, either in law or in fact for permitting delays for those services that are not yet operational from meeting their noncommercial capacity requirements as soon as their service is launched.

There is no evidence that Congress intended to permit DBS operators to phase in their public interest requirements over 5 years as suggested by USSB.[13] In fact, the flexibility provided for in the Act (permitting between 4 and 7 percent of capacity

flexibility prevents operators from bearing too great a burden at the outset while still meeting its public interest obligations. There is simply no evidence that Congress intended to hold the public interest requirements in abeyance until DBS matured.

Even DirecTv's suggestion of a 90 day delay is unnecessary. The satellite which will carry this service has not even been deployed. There is enough time to make the appropriate arrangements and procedures for getting noncommercial programming on the air with all other services. If operators are unable to find enough qualified noncommercial programming to fill capacity, the law gives them the authority to use the noncommercial space until a programmer is found.

Holding off the public interest requirements will only serve to prevent noncommercial programmers from "hitting the ground running" upon launch of the service.[14] Any delay of the public interest responsibilities would be harmful and unwarranted as a matter of law. Had Congress intended to permit phased in requirements or grandfathering of existing agreements, such would have been included in the law.[15]

---

[14] The likely result of a delay would be to keep the DBS operator from creating an orderly system of noncommercial access until the deadline arrived.

[15] CFA agree's with APTS (at 19) that grandfathering existing agreements is inappropriate. However, if the Commission were to grandfather current contracts, it should not do so for renewal terms. Furthermore, it should only apply to contracts fully executed before the date of passage of the Act.

III. Discretion Permitted Operators Regarding Noncommercial

control away from the DBS operator, or anyone else for that matter, is to make certain that there is no filter which noncommercial programming must pass through. Whether the filter is used to determine who gets on the system or to satisfy the operator once the programming begins, it does not change the fact that it represents an editorial decision by the DBS operator, in violation of the law.

The only role a DBS operator should play in selecting noncommercial programming for the system should be an initial determination whether an entity is qualified under the Commission's rules.[19] Once a determination is made that a noncommercial programmer is qualified, access should be determined purely on a first come, first served basis.[20]

DirecTv argues that only some of the noncommercial capacity must be made available to national educational programming suppliers, not all.[21] In essence, DirecTv instructs the

---

[19] Of course, this decision must be appealable to the Commission to prevent misuse by any party.

[20] For further discussion, See; Comments of CFA, May 24, 1993 at 19. CFA supports APTS's suggestion (at 23) that accreditation be the standard for qualification for educational institutions.

[21] DirecTv at 5-6. The argument that §335(b)(1) would be meaningless under the plain language of §335(b)(3), mixes program types with program entities. Surely, the type of programming eligible for the noncommercial capacity includes educational and informational programming as indicated by §335(b)(1). However, that programming must be supplied by a national educational

(continued...)

Commission to disregard the plain language of the statute in favor of a broader reading which would open the noncommercial capacity up to all types of programmers, presumably including, commercial ones.[22] CFA believes this is "wishful reading" on the part of DirecTv and must be discarded in light of the plain language of the Act. Where there is no ambiguity in the law, the Commission cannot allow the industry to create one.

B. Scheduling of Programming and Channel Placement.

The industry also proposes a system which gives DBS operators the power to assign the noncommercial programming to channels and dayparts in their discretion.[23] Some operators want to decide whether noncommercial programming will be seen on

Obviously, an operator will need to make the initial determination as to what channels will be devoted to noncommercial use. However, this should be the extent of the role for the DBS operator.[25] Some of the proposals set forth by the industry could render the public interest requirements meaningless.

A system which permits the operator to fill in "dead time" with noncommercial programming would not satisfy Congress' intent. Operators are concerned with noncommercial capacity turning into a "de facto graveyard" like PEG channels have in some communities.[26] A system which gives a system the ability to meet its public interest requirements by placing programming at any time on any channel will assure just that.

This degree of "flexibility" prevents the noncommercial programming from building an audience base and permits operators to virtually guarantee low (or no) viewership by putting it in the middle of the night or other low viewership time periods. The most reasonable way to prevent this from occurring is to devote discrete channels (and/or part of discrete channels) to

---

[25] CFA shares the concern of DirecTv that one class of noncommercial entities could control all the capacity. DirecTv at 6. But this does not have to lead to editorial discretion by the DBS provider. Instead, the Commission should invoke CFA's approach limiting a single entity (or perhaps class of entities) to one full channel of programming. See; CFA at 11.

[26] DirecTv at 6.

noncommercial programming.[27] As another form of protection, CFA endorses APTS's suggestion that the noncommercial capacity should be offered as part of the lowest price tier of service.[28]

Furthermore, while everyone would like to see noncommercial programming that is popular, that is not the purpose of the set aside. In fact, it is just the opposite. The noncommercial carriage requirements guarantee access for programming that may not have widespread popularity like a movie channel or MTV. If there were no public interest requirements, then these types of programs would simply not be aired. Programming with a large audience, even if it is noncommercial in nature, would most likely be able to get carriage without this set aside. CFA urges the Commission not to lose sight of the fact that the noncommercial capacity was not designed, necessarily, to be a profit center for the DBS operator.

IV. What Entities Satisfy Requirements for Noncommercial Educational Programmers?

A. Looking to Programming Entity Rather than Program Content.

There seems to be general agreement among industry

---

[27] See; CFA at 11.

[28] APTS at 20.

commenters that the programming itself, rather than the entity that provides the programming should determine whether a show qualifies for noncommercial carriage.[29] They would like the Commission to disregard the requirement that the capacity be made available to national educational program suppliers. One industry commenter also believes audio programming should count toward meeting the obligation.[30] NATOA suggests a hybrid approach which looks both to the entity and the programming.[31]

CFA believes that the industry approach of looking to the programming without regard to the entity providing the programming must be rejected.[32] This approach not only disregards clear statutory language with respect to the type of programmer that can qualify for this noncommercial capacity[33], but it will mire DBS providers, the Commission and ultimately the courts in a messy attempt to make decisions based on program

---

[29] See; Discovery at 7; USSB at 10; DirecTv at 23.

[30] Primestar at 20. This is a strained reading in light of the wide spread references to video programming throughout the Act. It does not represent a good faith effort to comply with Congress' intent.

[31] NATOA at 15.

[32] CFA notes that APTS also advocates looking to the programming entity rather than the programming to avoid First Amendment concerns. APTS at 26.

[33] §335(b). The statute requires that noncommercial capacity be made available exclusively for "noncommercial programming of an educational or informational nature." To meet this obligation under the Act, the DBS provider must look to "national educational programming suppliers" to find such programming.

content. This is a dangerous road to take and risks raising serious First Amendment questions that are improper and totally unnecessary under the 1992 Act.

Two of the primary conditions for use of the noncommercial

capacity.[36] This is ludicrous in light of all of the other language in the Act. The directive to look at non-profit character is to determine whether charges below 50 percent of direct costs are warranted.[37]

B. Definition of a National Educational Program Supplier.

USSB makes the claim that it does not matter who provides the noncommercial programming, "otherwise the Cable Act would be taking capacity from DBS providers and giving it to defined entities..."[38] This is exactly what a noncommercial set-aside is designed to do. It does not give the capacity to a particular non-commercial programmer, rather it gives the capacity to a defined class of entities. These are national educational programming suppliers.

Educational Broadcasting Corp. (WNET) would have the Commission disregard the requirement that the entities which are entitled to use the noncommercial capacity be "national" programming suppliers.[39] The reason stated is that any entity

---

[36] USSB at 10.

[37] It is also a recognition that there are many types of non-profit entities, both wealthy and not wealthy.

[38] USSB at 13.

[39] Comments of Educational Broadcasting Corp. (WNET) at 4.

which gains access will automatically be a national service.[40] CFA believes it would be inappropriate to completely disregard this element of the Act.[41] Congress clearly knew the nature of DBS service, but it still chose to include this "national" requirement in the law.

In our initial comments in this proceeding, CFA advocates a broad definition of national programming suppliers.[42] CFA's definition will permit a wide array of programmers to gain access to noncommercial capacity, but will prevent a purely localized service which may not be designed to serve a national audience, from using that capacity at the expense of others. It will also fully comply with the terms of the 1992 Act.

CFA believes that any rules established by the Commission which would permit any entity that is not a "national educational programming supplier" to gain access to noncommercial capacity would violate the 1992 Cable Act. Furthermore, a system based on program content will inevitably lead to significant questions

---

[40] Id.

[41] Congress defined "national educational programming supplier" to include "any qualified noncommercial educational television station, other public telecommunications entities, and public or private educational institutions." §335(b)(5)(B). Clearly, some local entities, such as WNET, are included under the definition. Those which do not fall under the statutory definition, should have to meet the requirements set out in our comments. CFA at 17.

[42] CFA at 17.

about improper editorial control by the DBS provider. The Commission must reject industry attempts to change or disregard the plain language in the 1992 Act.

V. Rates for Noncommercial Users.

A. Definition of Direct Costs for Calculation of Rate Ceiling.

As CFA expected, industry commenters advocate a very broad definition of direct costs.[43] So broad in fact, that the industry definition of "direct costs" to be used for setting noncommercial rates reads more like a definition of all costs, direct and allocable. This would be a direct violation of the law.[44]

Direct costs are only those business costs directly related to producing a product or service. "Direct cost consists chiefly of the materials and supplies used to make a product and the

---

[43] Primestar at 19 (Include per channel pro-rated costs of construction, launch, insurance; Controlling, tracking and maintaining the satellite and ground station links.); DirecTv at 26 (Include costs of receiving signal at the uplink facility, costs of uplinking signal and continuing costs of operating and maintaining the facility; Personnel and administrative costs; Construction, launch, operation and insurance of satellite and uplink facilities; Costs associated with packaging and distributing non-commercial services including conditional access and billing.); USSB at 13 (All costs other than for general administration.)

[44] §335(b)(4)(B).

wages and salaries of personnel working in its production."[45] Direct costs are also known as "variable costs" and consist most commonly of labor costs.[46] Only those costs incurred as a direct result of having the noncommercial programming on the satellite should be included in calculating 50 percent of direct costs.

Clearly, any costs associated with the construction, launch and maintenance of the satellite or the uplink facilities would have been incurred whether or not the noncommercial programmer was using capacity. All of the aforementioned costs are not uniquely used to provide the noncommercial capacity, and therefore must be discarded from the calculation. Under the law, there can be no allocation of common or fixed costs, because they are not direct costs.

CFA believes that direct costs of delivering noncommercial programming will consist of: the capital and operating costs entailed in delivering noncommercial signals to interfacing with the inputs of the DBS operator's encoding and compression equipment; the cost of additional decoder authorizations occasioned by noncommercial use (if any); program guide expenses

---

[45] Dictionary of Business and Economics at 130 (C. Ammer & D. Ammer ed. 1984).

[46] See e.g., Dictionary of Economics at 417 (G. Bannock, R.E. Baxter & E. Davis ed. 1987); Dictionary of Modern Economics at 458 (D.W. Pearce ed. 1983).

entailed in listing noncommercial programming (if any); and direct taxes occasioned by the leasing of capacity to noncommercial users (if any).[47]

The goal of limiting noncommercial rates to a ceiling of 50 percent of direct costs was to make certain access to the satellite was affordable to the noncommercial programmers. Dumping in all allocable costs violates the express language of the statute and will serve to frustrate Congress' intent.[48]

B. Proposed Rate Structure for Noncommercial Programmers.

The overriding goal of the Commission in this proceeding must be to make the satellite accessible for qualified noncommercial programmers.[49] CFA supports the proposal put

---

[47] This analysis is similar to that set forth by APTS at 29. APTS included as a direct cost the allocable portion of encoding, compression, and uplinking; because encoding,

forward by NATOA, which advocates a sliding scale tied to ability to pay. This proposal is consistent with the Congressional mandate that the Commission make DBS capacity affordable to noncommercial programmers, and take into account "any federal funds used to support such programming" as it determines reasonable prices.[50]

CFA recommends that the Commission require that DBS capacity

essentially like to exempt themselves from this requirement altogether by making it totally unattractive to candidates.[53]

departs from the ordinary emphasis on licensee discretion.[55]

The suggestion by DirecTv to limit access to races of "national importance" is an unworkable and unnecessary standard.[56] It appears that DirecTv recognizes it would be appropriate to provide access to candidates other than those running for President or Vice President. However, the suggested means presents significant, and CFA believes ultimately unnecessary complications.

The fact is, even at the lowest unit rate, it may not be a good option for certain candidates to buy time on a DBS system, because the area of coverage may be too large. This will serve to weed out excessive demands for air time. It also allows for

unduly limit which candidates are permitted to gain access to the satellite. The burden would fall much harder on the candidate who desires access and cannot obtain it than on the DBS operator. It is not too great a burden, in exchange for using a limited public resource like the spectrum, to require DBS operators to enable greater participation in our representative democracy through allowing paid access to voters across the country.